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Supreme Court of the United States

October Term, 1952

No. 395

JAMES A. VAUGHAN,

Petitioner,

against

PETROLEUM CONVERSION CORPORATION,

Bankrupt-Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

REPLY BRIEF

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Citations

	PAGE
Cline v. Kaplan, 323 U. S. 97, 99, 89 L. ed. 97, 100 ..	3, 7, 8
Dickinson v. Burnham, —— U. S. —— 97 L. ed. (Advance, p. 58)	2
Matter of Feynman (C. C. A. 2nd) 77 F. (2), 320, 322	5
McDonald v. Plymouth County Trust Co., 286 U. S. 263, 76 L. ed. 1093	3

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The proceedings before the Referee epitomize jurisdiction duplicity.

In essence we have this anomalous situation:

1. The Referee at the beginning of the proceedings, under the prodding of the Trustee and Mr. Kahan's local attorney, determined in a series of rulings that he did not have summary jurisdiction over the substantial adverse claims of petition.
2. The Referee, nevertheless, thereafter assumed and exercised summary jurisdiction over such claims.
3. The Trustee and his attorney made an independent investigation in New York of the second trial proceedings in the case of Dickinson v. Rinke et al. in the District Court for the Southern District of New York, incident to which they interviewed Mr. Kahan and your petitioner; examined the trial record which they

described as "involved and lengthy" (R. 2); prepared and submitted to the Referee a Report reciting inter alia, (a) Mr. Kahan's "great stress on a claimed conflict of interest between Mr. Vaughan and Petroleum Conversion Corporation" but that the working together of Mr. Vaughan and Mr. O'Connell on the Dickinson v. Rinke case" seem(ed) to the Trustee, * * * fully justified * * * "; (b) the disclosure of the conflict "to Judge Leibell on the first page of the joint brief submitted by them * * * ", and (c) that "apparently no objection was raised to this cooperation between counsel until about March 1, 1948, when Mr. Kahan petitioned for leave to intervene (R. 2-3).

4. The Trustee, nevertheless, at the close of the proceedings, and without explanation for his about-face, filed Objections and a Counterclaim based on the ground that your petitioner had served "conflicting interests" and "was interested adversely to bankrupt" in the Dickinson v. Rinke litigation (R. 34-35) although the investigation by the Trustee and his attorney of the Dickinson v. Rinke trial record should have disclosed to them that the identical issues between the same parties had been previously raised and litigated in the second trial of Dickinson v. Rinke (R. 35, 48, 94). (See also Brief in Support, pp. 34-36.)

The matters herein are interrelated with the long and complicated litigation in the fraud case of *Dickinson* v. *Rinke, et al.*, beginning in March, 1938 and ending upon the denial by this Court on November 10, 1952 of Plaintiff Dickinson's petition for writ of certiorari to the United States Court of Appeals for the Second Circuit. *Dickinson* v. *Burnham* —— U. S. —— 97 L. ed. (Advance, p. 58).

Although the involvements of that protracted litigation are susceptible to confusion unless fully stated, it does not follow that such involvements should be capitalized on

to the detriment of petitioner or that jurisdiction duplicity should be permitted to bar presentation of petitioner's claims on the merits.

At page 13 of Brief in Opposition, it is urged that the Referee, at the outset of the adjourned first meeting of creditors on January 19, 1949, stated the nature and purpose thereof, and that his "remarks" related to the scope of the meeting.

The Trustee significantly omits, however, to state that it was he who introduced "Mr. Cooch's Memorandum" and an Accountant's Report at that meeting and that it was he and Mr. Kahan's local attorney, Mr. Stiftel, who invoked the Referee's determination and ruling that he did not have jurisdiction over the substantial adverse claims between the Trustee and your petitioner (Brief in Support, pp. 12-15).

As a judicial officer the powers of a Referee in Bankruptcy are limited. This Court in *Cline* v. *Kaplan,* 323 U. S. 97, 99, 89 L. ed. 97, 100, said, "Once it is established that the claim is not colorable or frivolous the claimant has the right to have *the merits* of his claim passed on in a plenary suit and not summarily. Of such a claim the bankruptcy court cannot retain further jurisdiction unless the claimant consents to its adjudication in the bankruptcy court" (emphasis supplied), citing *McDonald* v. *Plymouth County Trust Co.,* 286 U. S. 263, 76 L. ed. 1093, where "consent" to summary jurisdiction was a *bona fide* consent given by the Defendant in open court.

Obviously, the claims herein are substantial adverse claims, and the Referee, having before him (1) your petitioner's claims as a scheduled creditor filed November 19, 1948 (R. 30-31); (2) "Mr. Cooch's Memorandum", filed January 19, 1949 (R. 1, Petition, p. 12), and (3) the Accountant's Report on selected items prepared at

the behest of Mr. Kahan, filed by the Trustee January 19, 1949 (R. 25, Petition, p. 12), and under the prodding of the Trustee and Mr. Stiftel, made his determination that he was without summary jurisdiction over the petitioner's claims herein as expressed in a series of consistent rulings, made progressively clearer, set forth in the order in which the Referee stated such rulings at pages 13-15 of the Petition, viz.:

(a) With respect to restitution to bankrupt of funds employed in bankrupt's defense litigation—"*That is not for decision here*" (R. 9);

(b) With respect to restitution to bankrupt from your petitioner based on the Accountant's Report—"It is *not before me to decide* • • • that will have to be on an *independent suit* • • • " (R. 9);

(c) With respect to "recovery in the interests of the creditors"—"*I am not now sitting nor can I make any decision* whether there is any legal sufficiency to what could be contended • • • I think that would come *if you were to bring a suit* against these directors • • • " (R. 11);

(d) With respect to bankrupt's litigation expense the Referee, reminding the Trustee that Dickinson was throughout the litigation moving affirmatively against the bankrupt and the bankrupt was required to defend—"*This isn't the tribunal* which would determine whether Vaughn • • • used his best judgment or was technically at fault in not having Petroleum Conversion Corporation • • • say to Rinke Agency Subscribers, 'You have got to pay for your own ride' " (R. 12);

(e) With repect to Mr. Stiftel's urge for restitution by your petitioner—"We are not trying this *conflict* • • • if there has been some technical wrong done

> to the corporation (bankrupt), *that can't be straightened out here. That has got to be done in a suit which the Trustee or creditors would bring against those they would contend are responsible*" (R. 13). (All emphasis supplied.)

If the foregoing constitutes "an elaborate fabrication and distortion", as stated at page 13 of Brief in Opposition, it is a fabrication created by the Referee under the prodding of the Trustee and Mr. Kahan's local attorney.

Other than such unjustifiable characterization of the important question of jurisdiction here involved the Trustee avoids the issue.

Having thus decided that he did not have jurisdiction herein the Referee had no power thereafter to decide the merits. *Matter of Feynman* (C. C. A. 2nd), 77 F. (2) 320, 322. The basic principles of jurisprudence forbid jurisdiction duplicity on the part of any judicial officer, including a Referee in bankruptcy.

At page 7 of Brief in Opposition the Trustee contends that the filing of a claim in bankruptcy proceedings constitutes consent to summary jurisdiction.

The Trustee significantly omits to state that petitioner filed his claims as a scheduled creditor on November 19, 1948, and that they, among other documents, were before the Referee under consideration on January 19, 1949 when the Referee determined in his series of rulings above discussed that he was without jurisdiction. See also Brief in Support, pages 13-15.

For the reason that Referee was without jurisdiction by virtue of his own determination, proceedings with respect to petitioner's claims following his determination were a nullity.

Nevertheless, eight months after Referee's said determination, the Trustee on August 26, 1949 filed Objections to petitioner's claims to which your petitioner, by affidavit verified September 27, 1949, took exception on the ground that the Referee had previously refused to authorize the Trustee to take any action against your petitioner and closed the record (R. 31, Petition p. 16). Thereafter the Trustee filed his Set-off and Counterclaim and your petitioner, with counsel, conferred with the Trustee and his counsel on November 1, 1949 and presented to and left with the Trustee a draft of proposed response thereto, denominated an "answer", in confirmation of the conference, denying Trustee's unsupported statements and setting forth the facts in support of the denials, and challenging the Trustee to produce testimony or evidence to support certain of his statements (R. 36-39). He remained silent.

At pages 10-11 of Brief in Opposition the Referee objects to statement in petitioner's Brief in Support that "the Trustee filed petitioner's said proposed response with the Referee and without authority".

The Certificate of Referee on Petition for Review to the District Court for the District of Delaware, Index to Record, page 3, cites as a part thereof—"Answer by James A. Vaughan, filed November 1, 1949 to the 'Set-off and Counterclaim to claims of James A. Vaughan', filed by William M. Duffy, Jr., Trustee Herein". This entry, upon inquiry from the Trustee during the preparation of his brief, was brought to Trustee's attention. Since he now states he did not file petitioner's "answer", petitioner withdraws said statement in his Brief in Support.

Trustee's Objections and Set-off and Counterclaim were filed at the close of taking testimony. A motion to dismiss Trustee's Counterclaim for lack of jurisdiction did not

appear to be in order, the Referee having made that determination eight months previously on January 19, 1949 (Petition pp. 13-16).

Concerned with the irregularity of Trustee's belated about-face strategy the attorney for the bankrupt prepared and filed a Memorandum "In Reference to Claims of James A. Vaughan and Counterclaims of Trustee Thereto," presented argument at a stated meeting and at the request of the Referee prepared and submitted a Supplemntal Memorandum opposing the exercise of summary jurisdiction by the Referee and supporting the Referee's own prior determination that he did not have jurisdiction.

In addition to filing exceptions to the Trustee's Objections (*supra* p. 6), your petitioner approved and adopted in open court at the scheduled hearing on April 26, 1950, devoted to the question of Referee's jurisdiction, the position of the attorney for the bankrupt.

At page 9 of Brief in Opposition it is stated that the petitioner wrote a letter dated May 8, 1950 to the Referee, in which he "devoted his *arguments* exclusively to the merits and failed even to mention or refer to the jurisdictional point" (emphasis supplied). The letter referred to was in response to the Referee's oral request for certain additional facts which were thereby supplied. There was not an "argument" in it, jurisdictional or otherwise.

The Committees on the Judiciary of the Senate and House of Representatives, respectively, confirm the rule in *Cline* v. *Kaplan,* 323 U. S. 97, 89 L. ed. 97, which has been generally followed since 1944, " * * * that a respondent is not to be deemed to have consented, if he made a formal objection to the summary jurisdiction at any time before entry of the final order in the proceeding, even though the controversy had been proceeded with on its merits without

his objecting to jurisdiction" (Brief in Opposition, pp. 20, 22).

Until Section 2a(7) of the Bankruptcy Act was amended July 7, 1952 (Brief in Opposition, p. 19) the rule in *Cline* v. *Kaplan* obtained.

Your petitioner filed his formal objection to the summary jurisdiction herein on July 13, 1950 (R. 56, 58). The Referee entered his final order in the proceeding September 7, 1950 (R. 60).

Said amendment to the Bankruptcy Act does not diminish the importance of enforcing the rule in the *Cline* v. *Kaplan* case, so long as it obtains, regardless of the reasons for the amendment.

It is respectfully submitted that the petition for a writ of certiorari should be granted.

JAMES A VAUGHAN,
Petitioner,

By GERARD P. KAVANAUGH,
Attorney for Petitioner.

Dated: January 8, 1953.